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No. 84-388

In The

Supreme Court of the United States

October Term, 1984

PEGGY MARSHALL,

Petitioner,

v.

CAROLYN P. McMAHAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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QUESTIONS PRESENTED

1. Whether appointment of a successor clerk of court when the term of the predecessor clerk had expired, prior to a hearing on the issue of the length of the term of the predecessor clerk, raises a substantial federal question of due process of law within the meaning of the Fourteenth Amendment.

2. Whether this case is moot, the term of the predecessor clerk having now expired even under her theory of the case.

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STATEMENT OF THE CASE

Respondent generally agrees with the chronology of events set forth in the Petitioner's Statement of the Case.

REASONS FOR DENYING THE PETITION

Jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. § 1257(3) on the theory that her tenure as a court clerk was terminated before she had an opportunity for a hearing, in violation of the Due Process

Clause of the Fourteenth Amendment (Petition, pp. 22-27). However, the Petition should be denied because (1) the federal question is insubstantial, since Petitioner was in fact accorded a hearing and therefore "due process," and (2) the issues raised by Petitioner are moot.

Insubstantial Federal Question

For this Court to grant a petition for certiorari pursuant to 28 U.S.C. § 1257(3), the federal question must be substantial. *Zucht v. King,* 260 U.S. 174 (1922); *Duncan v. Tennessee,* 405 U.S. 127 (1972). It is well settled law that not every mere allegation of a federal question will suffice to give jurisdiction and this Court will not undertake to review a case where the federal question has been settled by prior decisions of this Court. *Equitable Life Assurance Society v. Brown,* 187 U.S. 308, 311, 314-15 (1902); *Milheim v. Moffatt Tunnel Improvement District,* 262 U.S. 710, 717 (1923).

The dispositive issue in this case was one solely of Tennessee law, *i.e.,* whether the purported appointment of a clerk and master of a chancery court was valid. That issue was fully resolved by a final judgment entered by the Supreme Court of Tennessee on May 7, 1984. In re *Appointment of Clerk & Master for Sevier County,* 670 S.W.2d 215 (Tenn. 1984), *rehearing denied,* 1984. That decision of necessity also determined the validity of the procedures followed at the trial court level (Petitioner's "main goal" (Petition, p. 21)). The only hint of a federal question raised at any stage below was the lack of a hearing prior to the order of the state trial judge appointing a new clerk (Petition, pp. 22-23).

Petitioner was in fact accorded a full evidentiary hearing on the merits (Petition, pp. 11-12, 22, B-5 to B-8). Exhibits were received and the trial judge explicitly invited both parties to introduce any other proof either party desired *(Id.,* p. 22). That hearing fully satisfied the requirements of the Due Process Clause. Due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered. *Ewing v. Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950); *Wilson v. Standefer,* 184 U.S. 399 (1902).

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BRIEF IN OPPOSITION TO PETITION

Where, as here, only property rights are involved (Petition, pp. 23-24), the mere postponement of judicial inquiry is not a denial of due process if the opportunity given for the ultimate judicial determination is adequate. *Mitchell v. W. T. Grant Co.,* 416 U.S. 600 (1974); *Phillips v. Commissioner,* 283 U.S. 589 (1931).

Thus the "federal question" is "so wanting in substance as not to need further argument." *Milheim v. Moffatt Tunnel Improvement District,* 262 U.S. 710 (1923).

"Mootness"

The gravamen of Petitioner's action below was to seek reinstatement as clerk and master of the chancery court (Appendix B to Petition). Under her theory of the case her appointment of June 1, 1978 began a six-year term (Petition, p. 19). Thus, even under her theory, her term would have expired May 31, 1984. Reinstatement is no longer available as a remedy. The only money dam-

ages requested were "her accrued emoluments of office since her removal." (Petition, p. 11). The Tennessee Supreme Court necessarily determined that since her term had expired, there were no such "accrued emoluments of office" owed to Petitioner. In re *Appointment of Clerk and Master for Sevier County, Tennessee,* 670 S.W.2d 215 (Tenn. 1984). Review of the state law issue is not sought in this Court nor could it be properly sought, since this Court has no power to revise judgments of state courts on questions of state law. *Henry v. State of Miss.,* 379 U.S. 443 (1965); *Scripto, Inc. v. Carson,* 362 U.S. 207 (1960).

Since reinstatement is no longer available and no other remedy is sought in this Court, the case is moot. *Franks v. Bowman Transportation Co., Inc.,* 424 U.S. 747 (1976); *DeFunis v. Odegaard,* 416 U.S. 312 (1974).

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CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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